



Republican Policy Committee

Don Nickles, Chairman Kelly Johnston, Staff Director 347 Russell Senate Office Building (202)224-2946

February 2, 1995

Reading the Feinstein Amendment

During the Judiciary Committee's markup of the balanced budget constitutional amendment (S.J.Res. 1 / H.J.Res. 1), Senator Feinstein attempted to exclude from the amendment the receipts and outlays of two major Social Security funds, the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund. Her proposal was defeated, but narrowly. (If one Senator had switched from "yea" to "nay" the motion to table would have failed.) Senator Feinstein and her allies have promised to try again, perhaps repeatedly, on the Senate floor.

The Feinstein Amendment Itself

The Feinstein amendment proposes to take particular statutes of the United States and graft them onto the Constitution of the United States. This unprecedented -- not to say revolutionary -- idea seems to permit future *statutory* enactments that would have *constitutional significance*.

The Feinstein amendment would add a sentence to Section 7 of the underlying proposal. That underlying section defines "total receipts" and "total outlays" and contains but two sentences. The Feinstein amendment proposes to add at the end a third sentence which would exclude from the general definitions the receipts and outlays of the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund (OASI/DI).

The original section 7 is shown below, with the (unsuccessful) Feinstein amendment added at the end in italics:

"Section 7. Total receipts shall include all receipts of the United States Government except those derived from borrowing. Total outlays shall include all outlays of the United States Government except for those for repayment of debt principal. *The receipts (including attributable interest) and outlays of the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund shall not be counted as receipts or outlays for purposes of this article.*"

Observations on the Amendment

When reading the Feinstein amendment, the following points seem especially noteworthy:

First, the more troubling questions about the Feinstein amendment revolve around its constitutional character. As noted above, the amendment seems to establish a sort of quasi-constitutional device whereby Congress and the President (or the Congress alone when it overrides a presidential veto) can do something of constitutional significance by enacting a statute.

The Feinstein amendment designates the receipts and outlays of two particular statutory trust funds, see Title II of the Social Security Act, 42 U.S.C. §401 *et seq.* (1988 ed.), and then tries to "constitutionalize" them. This is unprecedented. Statutes have never been incorporated into the Constitution of the United States.

Second, the Feinstein amendment is open-ended; there is no time limit on future amendments. It would "constitutionalize" the OASI and DI trust funds on the date of enactment and forever thereafter, however amended. This is no small point.

The entire Social Security Act has been amended hundreds of times. The key section that establishes the Old-Age and Survivors Insurance Trust Fund and the Disability Insurance Trust Fund, 42 U.S.C. §401, has been amended 21 times, or about once every three years. This pace has increased greatly in recent years: there have been 12 amendments since 1980, or almost one per year, as shown below.

The OASDI trust funds were established by Title II of the Social Security Act, signed August 14, 1935, Public Law 74-271, 49 Statutes at Large 622. Since that date, just the first section of Title II, section 201 (codified at 42 United States Code section 401), has been amended on the following dates as shown. Some of these amendments have been minor, but many have been important.

Aug. 10, 1939, P.L. 76-379, 53 Stat. 1362;
Feb. 25, 1944, P.L. 78-235, 58 Stat. 93;
Aug. 28, 1950, P.L. 81-734, 64 Stat. 521;
Aug. 1, 1956, P.L. 84-880, 70 Stat. 819;
Aug. 28, 1958, P.L. 85-840, 72 Stat. 1021;
Sept. 22, 1959, P.L. 86-346, 73 Stat. 622;
Sept. 13, 1960, P.L. 86-778, 74 Stat. 992;
July 30, 1965, P.L. 89-97, 79 Stat. 338, 370, 400;
Jan. 2, 1968, P.L. 90-248, 81 Stat. 837, 875;
Dec. 30, 1969, P.L. 91-172, 83 Stat. 741;
July 1, 1972, P.L. 92-336, 86 Stat. 422;
Oct. 30, 1972, P.L. 92-603,
86 Stat. 1360, 1364, 1484;
Dec. 31, 1973, P.L. 93-233, 87 Stat. 955;
Jan. 2, 1976, P.L. 94-202, 89 Stat. 1137;
Dec. 20, 1977, P.L. 95-216, 91 Stat. 1513;
June 9, 1980, P.L. 96-265, 94 Stat. 459, 474;

Oct. 9, 1980, P.L. 96-403, 94 Stat. 1709;
Dec. 29, 1981, P.L. 97-123, 95 Stat. 1659;
Apr. 20, 1983, P.L. 98-21,
97 Stat. 91, 98, 99, 105, 107, 135;
July 18, 1984, P.L. 98-369,
98 Stat. 1156, 1160, 1170;
Apr. 7, 1986, P.L. 99-272, 100 Stat. 180;
July 1, 1988, P.L. 100-360, 102 Stat. 741;
Nov. 10, 1988, P.L. 100-647, 102 Stat. 3781;
Dec. 13, 1989, P.L. 101-234, 103 Stat. 1981;
Nov. 5, 1990, P.L. 101-508,
104 Stat. 1388-268, 1388-274, 1388-627;
Aug. 15, 1994, P.L. 103-296,
108 Stat. 1478, 1517, 1535, 1537;
Oct. 22, 1994, P.L. 103-387, 108 Stat. 4074.

Under the Feinstein amendment, future amendments to Title II may have constitutional significance. It need hardly be said that they will have fiscal importance.

Third, the Feinstein amendment is unrestricted; there is no limit on the subject matter of future amendments. It will "constitutionalize" every program or policy that future Congresses add to Title II, whether or not related to the original purposes of those trust funds.

Of course, the pace of amendments to Title II likely will increase rapidly because the Feinstein amendment provides an incentive for adding extraneous items: Once in Title II, the additional receipts and outlays will be "off budget."

Fourth, while points two and three emphasize the vast embrace of the Feinstein amendment, this point shows that no topic will be too narrow or minute.

Section 201 of the Social Security Act was most recently amended on October 22 of last year by section 3(a) of the Social Security Domestic Employment Reform Act of 1994 (shown below). Had the Feinstein amendment been in the Constitution, the language that is quoted below would have had some kind of *constitutional* significance.

"Sec. 3(a) Allocation With Respect To Wages.-- Section 201(b)(1) of the Social Security Act (42 U.S.C. 401(b)(1)) is amended by striking '(O) 1.20 per centum' and all that follows through 'December 31, 1999, and so reported,' and inserting '(O) 1.20 per centum of the wages (as so defined) paid after December 31, 1989, and before January 1, 1994, and so reported, (P) 1.88 per centum of the wages (as so defined) paid after December 31, 1993, and before January 1, 1997, and so reported, (Q) 1.70 per centum of the wages (as so defined) paid after December 31, 1996, and before January 1, 2000, and so reported, and (R) 1.80 per centum of the wages (as so defined) paid after December 31, 1999, and so reported.'." P.L. 103-387, §3(a), 108 Stat. 4074-75, Oct. 22, 1994.

This is not the kind of soaring language that one associates with the Constitution of the United States.

Fifth, the Feinstein amendment -- although only about 35 words long -- has the most extraordinarily complex implications. The amendment is short because it uses titles, but giving short names to complex laws does not simplify the laws.

The Feinstein amendment cites the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund, but they, together with their legislative histories, take up some 300 pages in the United States Code. 42 U.S.C. §401 - §433 (1988 ed. & Supp. V 1993). A truer picture of the Feinstein amendment can be obtained by restating it with elaboration, for example:

"The receipts (including attributable interest) and outlays of the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund [comprising Title II of the Social Security Act, 42 U.S.C. §401(a)-(m),

§402(a)-(x), §403(a)(I), §404(a)-(e), §405(a)-(r), §405a, §406, §407, §408, §409, §410(a)-(q), §411(a)-(i), §412, §413(a)-(d), §414(a)-(b), §415(a)-(i), §416(a)-(I), §417(a)-(h), §418(a)-(n), §420, §421(a)-(k), §422(a)-(d), §423(a)-(i), §424a(a)-(h), §425(a)-(b), §426(a)-(h), §426-1(a)-(c), §426a(a)-(c), §427(a)-(h), §429, §430(a)-(d), §431(a)-(c), §432, §433(a)-(e) (1988 ed.), as amended, where relevant, and comprising tens of thousands of words, together with all relevant judicial decisions and agency rules and adjudications, comprising millions and millions of words] shall not be counted as receipts or outlays for purposes of this article.

Additionally, Title II of the Social Security Act is referred to in numerous other sections of Title 42 of the U.S. Code, and it is also referred to in Titles 2, 5, 7, 10, 12, 14, 22, 26, 29, 30, 31, 38, 45, 49 App., and 50 App. of the Code.

The framers used only a few thousand words for the entire Constitution of the United States. Title II of the Social Security Act, on the other hand, requires tens of thousands of words. And many of those tens of thousands are going to have constitutional significance.

Sixth, the Feinstein amendment, curiously, omits a third Social Security trust fund, the Federal Hospital Insurance Trust Fund ("Medicare part A"), 42 U.S.C. 1395i (1988 ed.). There is no particular reason that the amendment must for consistency's sake include all "safety net" trust funds for the elderly, but the suspicion persists that Medicare was omitted because it is facing a near-term financial crisis. Of course, with the Feinstein amendment, a future Congress may redefine Medicare as a part of Title II and thereby tie it to the other trust funds that will be "constitutionally off budget."

Seventh, the problems with the Feinstein amendment probably cannot be solved by redrafting. The problems are more fundamental.

The House of Representatives defeated a number of variations on the Feinstein amendment (both in committee and on the floor). Probably the most prominent House proposal was the Gephardt-Bonior amendment, the relevant section of which is printed below. That amendment both narrows the Feinstein language ("shall be limited to receipts and outlays that provide"), and enlarges it ("any successor funds"). Regardless, though, the Gephardt-Bonior amendment still "constitutionalizes" the Title II of the Social Security Act, and that is the chief problem with the Feinstein amendment.

"Section 4. Total receipts shall include all receipts of the United States except those derived from borrowing and total outlays shall include all outlays of the United States except those for the repayment of debt principal. Total receipts shall not include receipts (including attributable interest) for the financing of benefits and administrative expenses of the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund, or any successor funds, and total outlays shall not include outlays for disbursement of the Federal Old-Age and Survivors Insurance Trust Fund for benefits and administrative expenses and the Federal Disability Insurance Trust Fund for benefits and administrative expenses, or any successor funds. The receipts and

outlays referred to in the preceding sentence shall be limited to receipts and outlays that provide old-age and survivor cash benefits for individuals based upon their earnings and dependents of such earners or provide disability cash benefits for disabled individuals based upon their earnings and dependents of such earners." 141 Cong. Rec. H 473 (daily ed. Jan. 20, 1995) (amendment no. 29 to H.J.Res. 1).

Re-drafting is not going to fix the Feinstein amendment. Any attempt to stick a named statute into the Constitution of the United States presents too many problems for American constitutionalism. The problem is not a technical one.

The Feinstein amendment is short, but long on problems. It presents enormous problems for our constitutional structure, for fiscal stability, and for wise public policy -- including, of course, the financial integrity of the Social Security system.

Staff contact: Lincoln Oliphant, 224-2946